

MICHAEL ALLEN MOORE, JR.
Claimant

L&G FOODS, LLC

Docket No. 1,044,449

UNKNOWN

AND

The claimant alleges the ALJ erred. He maintains that his back and shoulder complaints are the result of an injury he sustained while moving furniture for his employer on January 24, 2009. Respondent's representatives testified to the contrary and the Kansas Workers Compensation Fund (Fund) asks the Board to affirm the ALJ's Order. It

does not appear that respondent has counsel in this matter and no brief has been filed in support of its position.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds that the ALJ's Order should be affirmed in all respects.

The resolution of this claim turns solely upon the credibility of the parties' and their witnesses. There were a number of depositions taken in advance of the preliminary hearing and a recitation of that testimony and that provided at the preliminary hearing is not necessary. The briefs filed by claimant and the Fund show that they are familiar with the underlying facts. Suffice it to say claimant alleges he was injured on Saturday, January 24, 2009, while moving personal and office furniture from one location to another with Derly Lopez, one of respondent's owners. Although Derly Lopez concedes furniture was moved on that day, he maintains that his father helped him move and claimant had no involvement in this activity. In fact, he maintains claimant was not scheduled to work that day. Other members of Mr. Lopez's family confirm that furniture was moved but they all deny that claimant played any part in that effort, although their versions of who did, in fact, help Derly Lopez move the furniture is not wholly consistent.

To further muddle the waters, claimant's own stepfather, Noe Martinez, who also worked for respondent and with whom claimant was living with at the time does not corroborate claimant's version of the events. Mr. Martinez did testify that claimant had asked to borrow his truck to help a friend move on a Saturday in January 2009. He also indicated that on January 26, 2009 claimant called him in the morning saying that he had a fever, was throwing up and unable to work that day. His symptoms continued to January 31, 2009 when he again called Mr. Martinez who, in turn, told him to get a statement from a doctor.

Following the preliminary hearing, the ALJ issued her order and denied claimant's request for benefits. In doing so, she made the following findings:

1. Respondent, L&G Foods, LLC is a limited liability company. Thus, pursuant to K.A.R. 51-11-6, the amount of money paid to family members is to be included in determining respondent's payroll.
2. The respondent does have a payroll sufficient to require them to be covered by the Kansas Workers Compensation Act.
3. Claimant alleges that he injured his back while moving furniture for respondent on or about January 24, 2009.

4. Two witnesses testifying for respondent dispute claimant's allegations that he moved furniture for respondent on or about January 24, 2009. The witnesses further dispute claimant's allegations regarding notice of a work injury within ten days after said injury.

5. The court concludes that claimant has failed to prove by a preponderance of the credible evidence that he suffered an accidental injury arising out of and in the course of his employment with the respondent.¹

As noted above, credibility is the key in this claim. There appears to be no dispute that claimant has suffered an injury and is in need of medical treatment, but how claimant came to be injured is hotly contested. The Board has, in the past, found that where there is conflicting testimony, as in this case, credibility of the witnesses is important.² Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for workers compensation benefits the ALJ apparently believed their testimony over the claimant's testimony. And after considering the same testimony, and affording the ALJ some deference given her ability to assess the witnesses testimony, this Board Member finds the Order should be affirmed.

It is worth noting that even the emergency room records, entered into evidence at the preliminary hearing, do not corroborate claimant's version of his alleged accident. The records, generated on February 3, 2009, indicate that claimant was seeking treatment for back pain, with an onset of approximately 1 week. That same document indicates that the mechanism of injury was due to a *fall on ice*. There is no mention of moving furniture. It may be that there is a logical explanation for this notation, but the record reveals none. Claimant's recitation of the events is simply uncorroborated and while corroboration is not a necessity, when faced with this degree of contradiction, it is difficult to accept his allegations at face value.

Like the ALJ, this Board Member is not persuaded that claimant sustained an accidental injury arising out of and in the course of his employment with respondent on January 24, 2009 as alleged. The ALJ's Order is affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.³ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as

¹ ALJ Order (May 13, 2009) at 1-2.

² *Howe v. USD 263*, No. 1,037,749, 2008 WL 924567 (Mar. 12, 2008).

³ K.S.A. 44-534a.

permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 13, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: John C. Nodgaard, Attorney for Claimant
Angel Lopez/Derly Lopez, L&G Foods, LLC
James R. Roth, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge